93-81

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN J. HART,

Petitioner,

v.

STOCKMAR ENERGIE, INCORPORATED,
d/b/a L.F.C. POWER CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Sacramento Appellate Department

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In ruling that Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, pre-empts application of the California wage-and-hour law to employees working under collective bargaining agreements, did the Superior Court for the State of California, in and for the County of Sacramento, Appellate Department, deprive petitioner of rights guaranteed him under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the courts below are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John J. Hart prays that the Court issue a writ of certiorari to the Superior Court of the State of California, in and for the County of Sacramento, Appellate Department.

OPINIONS BELOW

The decision of the Sacramento Municipal Court is set forth at pages 1a to 9a of the Appendix (App. 1a-9a). The ruling of the Superior Court of the State of California, in and for the County of Sacramento, Appellate Department, reversing the Municipal Court, is set forth at App. 10a, and the Superior Court's decision on petition

for rehearing is set forth at App. 11a. The Order of the Court of Appeal of the State of California, in and for the Third Appellate District, denying petitioner's petition for writ of mandate, is set forth at App. 13a. The order of the Supreme Court of the State of California, denying petitioner's petition for review, is set forth at App. 14a. None of these decisions or orders has been officially reported.

JURISDICTION

The Superior Court of the State of California, in and for the County of Sacramento, Appellate Department, entered its ruling on petition for rehearing, reversing the trial court and finding the petitioner's claim pre-empted by federal law, on October 13, 1992. On January 28, 1993, the Court of Appeal of the State of California denied petitioner's writ of mandate, and on March 17, 1993, the California State Supreme Court issued its order denying petitioner's petition for review of the Court of Appeal order. On June 9, 1993, the Honorable Justice Sandra Day O'Connor issued an order granting petitioner a thirty-day extension of time, until July 15, 1993, in which to file this petition for writ of certiorari. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in relevant part:

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in

> an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Cal. Lab. Code § 201 provides in relevant part:

> If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.

Cal. Lab. Code § 203 provides in relevant part:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days.

Cal. Lab. Code § 229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

STATEMENT OF THE CASE

A. Facts

Petitioner John Hart is a construction electrician. Between May 16 and August 29, 1988, Respondent Stockmar Energie, doing business as L.F.C. Power Systems Corp. ("LFC"), employed Hart under a collective bargaining agreement between the company and the National

Industrial Union ("NIU").[1] On August 29, LFC's field supervisor, Don Morrell, terminated Hart, and presented him with a check for wages owed through the time of his termination. Upon receiving the check, Hart pointed out to Morrell that he had worked one hour of overtime during the preceding pay-period which was not reflected in the paycheck, and that he was therefore entitled to more money. App. 5a.

The California Labor Code requires an employer who discharges an employee to pay that employee all wages due at the time of discharge. Cal. Lab. Code § 201. It further imposes penalties on employers who willfully fail to make timely payments. *Id.* § 203.

Two weeks after he was terminated, Hart still had not received pay for his overtime. At Hart's request, Ed Stuart, the NIU Business Manager, filed a grievance with LFC, seeking both the wages owed for the overtime work, and "all applicable penalties under state and federal law." App. 2a. Stuart met with an LFC representative on September 26, 1988, and, on October 10, Hart received a check from LFC for $27.38 in overtime compensation. NIU declined to process the grievance any further: there were no provisions in the collective bargaining agreement for penalties for late payments, and the union had therefore secured all the relief available through the grievance-arbitration procedure. App. 3a.

Hart then began his attempts to secure § 203 penalties under California law. The California Labor Code authorizes the state Labor Commissioner to enforce claims for penalties owed under §§ 201 and 203, on behalf of employees who are "financially unable to employ counsel and . . . have claims which are valid and enforceable."

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[1] At the time of the events in this case, petitioner Hart was a member of the NIU. That union subsequently disbanded, App. 3a, and Hart is now a member of Local 340 of the International Brotherhood of Electrical Workers, AFL-CIO.

Cal. Lab. Code § 98.3(a). Hart filed a claim for penalties with the Labor Commissioner. As a matter of policy, however, the Commissioner does not process claims filed by employees working under collective bargaining agreements, *Livadas v. Aubry*, 749 F. Supp. 1526, 1528 (N.D. Cal. 1990), *rev'd*, 943 F.2d 1140 (9th Cir. 1991), *petition for cert. filed*, 61 U.S.L.W. 3836 (U.S. June 3, 1993) (No. 92-1920),[2] and he therefore declined to process Hart's claim. App. 3a. Hart subsequently filed a civil action to collect the penalties in the Sacramento Municipal Court.[3]

B. Proceedings Below.

Hart filed his complaint in the Sacramento Municipal Court on September 1, 1990. LFC defended on the grounds, *inter alia*, that resolution of Hart's claim required "the interpretation or application of a collective bargaining agreement," and was therefore both barred by § 229 of the California Labor Code and preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. App. 3a. After trial, Judge John Lewis held, as

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[2] The facts underlying *Livadas* are almost identical to those herein. Karen Livadas was terminated from her job, received her final paycheck three days later, and filed a claim under Labor Code §§ 201 and 203 with the State Labor Commissioner, who declined to process it "for the sole reason that she [was] an employee with a [collective bargaining agreement] containing an arbitration clause." 749 F. Supp. at 1528. Rather than pursuing her claim in state court, as did Mr. Hart, Ms. Livadas filed an action in the federal district court, claiming that the Commissioner's denial of benefits interfered with her federal rights under the NLRA, and therefore violated 42 U.S.C. § 1983. On cross motions for summary judgment, the district court held that Livadas had stated a claim under § 1983. 749 F. Supp. at 1535. The Ninth Circuit, however, reversed. 943 F.2d at 1147.

[3] Section 208 of the California Labor Code, Cal. Lab. Code § 208, permits individuals to pursue claims to enforce provisions of the Code in state court. Hart filed his complaint and prosecuted the action in Municipal Court *pro se*.

a matter of law, that the claim was neither barred by the statute nor pre-empted by Section 301. App. 4a. He further found, on the facts, that LFC had willfully withheld Hart's overtime compensation, and awarded Hart penalties totalling $4,380.00. App. 8a-9a. The judge found no need to apply or interpret the collective bargaining agreement in making these determinations.

LFC appealed the Municipal Court's decision to the Appellate Department of the Superior Court of the State of California. In opposing the appeal, Hart specifically noted the dangers inherent in finding § 301 to pre-empt minimum state labor standards. Quoting from *Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts*, 471 U.S. 724, 756 (1985), Hart pointed out that:

> [i]t would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimum standards on nonunion employers.

Respondent's Opening Brief on Appeal from the Municipal Court of Sacramento County, at 7.

On September 10, 1992, the Superior Court entered an order, reversing the Municipal Court's judgment without explanation. LFC filed a petition for rehearing, requesting a statement of the rule of law to be applied by the trial court. The Superior Court granted the petition and entered a new decision, holding that Hart's claims were "barred by Labor Code section 229 and pre-empted by section 301 . . . ." App. 11a.

Hart sought review of the Superior Court's decision by filing a petition for writ of mandate with the California Supreme Court.[4] The Supreme Court transferred the

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[4] California does not provide any appeal as of right from the Superior Court. A litigant seeking relief from a Superior Court decision may attempt to obtain discretionary review, either through a court of appeal order, transferring the case "when the superior court certifies, or the court of appeal determines, that such transfer

matter to the Court of Appeals, App. 12a, which denied the petition for writ of mandate. App. 13a. Hart then sought review by the State Supreme Court, which that court denied. App. 14a.

REASONS FOR GRANTING THE WRIT

In crafting doctrines of federal labor pre-emption—under § 301 of the LMRA, and under §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158—this Court has sought to balance the states' legitimate local interests in exercising their police powers, and the federal interest in advancing the various policies embodied in national labor law. Purporting to apply this Court's principles governing pre-emption under § 301, the Superior Court held that provisions of California's minimum wage statute were unavailable to the petitioner *solely* because he was employed under a collective bargaining agreement.[5] The court's decision in this regard—which "penalized workers who have chosen to join a union" by withholding the benefits of state labor regulations, *Metropolitan Life*, 471 U.S. at 756—merits this Court's review for two related reasons.

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appears necesary to secure uniformity of decision or to settle important questions of law," Cal. Civ. Proc. Code § 911; or through a writ of mandate, Cal. Civ. Proc. Code § 1085. *See, Simon v. Superior Court*, 4 Cal. App. 4th 63, 68, 5 Cal. Rptr. 2d 428 (1992); *Knudson v. Superior Court*, 267 Cal. App. 2d 876, 880 (1968) (citing Cal. Code of Civ. Pro. § 988t, precursor to § 911.)

[5] Although Cal. Labor Code § 229 and the Commission's non-enforcement policy purport to apply when employees work under bargaining agreements *containing arbitration provisions*, the fact is that "[f]ully 96% of [collective bargaining agreements] provide for arbitration." *Livadas v. Aubrey*, 749 F. Supp. at 1533 (*citing Characteristics of Major Collective Bargaining Agreements* (U.S. Dept. of Labor Bull. 2013, 1979), 82.) As a practical matter, the Commissioner's policy, endorsed by the Superior Court, thus precludes virtually all employees working under bargaining agreements from enjoying the protections of the Labor Code.

First, the Superior Court's ruling conflicts with the principles articulated by this Court in *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202 (1985), and *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), regarding when the resolution of a state claim is sufficiently "independent" of the collective bargaining agreement to survive a claim of pre-emption under § 301. To the extent the court's error in this regard reflects lingering confusion within both the federal and state judiciaries in identifying when claims are "intertwined with" or "independent of" labor agreements,[6] *Allis-Chalmers*, 471 U.S. at 212, the California court's ruling warrants the Court's attention.

Moreover, the cavalier treatment of this case by the Superior Court points up the danger that lurks in leaving this area confused, for that court's misapprehensions concerning the reach of § 301 pre-emption threaten to undermine fundamental policies embodied in the NLRA, and thus implicate principles of NLRA pre-emption. The court understood § 301 to *require* the state to withhold the benefits of an otherwise generally-applicable state minimum-standards law to employees *covered by a collective bargaining agreement*, without regard to whether that agreement reaches the subject of the state law. The California court's decision disrupts the balance that federal labor laws seek to maintain, by placing a serious

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[6] The Ninth Circuit has characterized § 301 pre-emption as a "tangled interplay between federal and state law," constituting "one of the most confused areas of federal litigation," *Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991), while the Supreme Court of Washington has described this as an area in which "the courts are still struggling to ascertain when a claim's resolution actually *will* involve interpretation of the collective bargaining agreement." *Commodore v. University Mechanical Contractors*, 120 Wash. 2d 120, 129, 839 P.2d 314, 318 (1992) (emphasis in original). As the Washington court observed, "Section 301 cases are still far from uniform or consistent, varying widely in their holdings, even after *Lingle*." *Id.* *See also* Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 209 (1989) (describing Section 301 preemption as a "thicket").

impediment in the path of employees' decisions whether, and to what extent, to engage in collective bargaining. In this regard, while it comports with the approach taken by the Ninth Circuit in *Livadas v. Aubry*, 943 F.2d 1140, the Superior Court's decision directly conflicts with decisions of the Fourth and Eighth Circuits. *See Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148 (4th Cir. 1992), and *Steelworkers v. Johnson*, 830 F.2d 924 (8th Cir. 1987) (en banc). It accordingly presents an important issue which should be settled by this Court.

1. In delineating the contours of § 301 pre-emption, this Court has taken pains to define rules that would preserve the interests embodied in federal labor policy, while not subverting rights of states to establish minimum protections for its citizens. Thus, on the one hand, § 301 pre-emption is invoked to foster the federal interests in assuring uniform interpretations of collective bargaining agreements, *Teamsters v. Lucas Flour*, 369 U.S. 95, 103-04 (1962), and preserving "the central role of arbitration in our 'system of industrial self-government.'" *Allis-Chalmers v. Lueck*, 471 U.S. at 219 (*quoting Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)). In that respect, claims asserted under state law will be deemed pre-empted when either "founded directly on rights created by collective-bargaining agreements, [or] 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (*quoting Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.8 (1987)).

On the other hand, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine v. Arkansas-Best Freight System, Inc.*, 540 U.S. 728, 737 (1981). This Court has accordingly made clear that it would be "inconsistent with congressional intent under [§ 301] to pre-empt state rules that . . . establish rights and obligations, *independent* of a labor contract." *Allis-Chalmers*, 471 U.S. at 212 (emphasis added).

Petitioner's claim herein is that the California Labor Code established "rights" for private sector employees who are terminated from their jobs, and imposed precise "obligations" on employers, which exist, and are enforceable, "independent of a labor contract." The Labor Commissioner, and ultimately the Superior Court, viewed both the state law itself and principles of labor pre-emption to dictate otherwise. Thus, the Commissioner—as endorsed by the court—read § 229, the state legislature's pre-emption formula, to deprive any employee covered by a collective bargaining agreement of the protections of §§ 201 and 203. *And* the court found that principles of federal labor law support and demand the same result.

2. In *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987), this Court emphasized that "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." In *Fort Halifax*, the state legislature guaranteed minimum benefits to represented and unrepresented employees alike. The issue for this Court was whether it was inconsistent with federal law for the state to exercise its power by prescribing conditions for represented employees which their unions could otherwise bargain. In the instant case, by contrast, the state has "lightly inferred" pre-emption as a basis for *withholding* its power from one distinct sector of the working public: those employees covered by collective bargaining agreements. This case thus presents, in the starkest terms, the risk to employees' federally protected rights when the state erroneously views § 301 as precluding it from even-handedly utilizing its traditional police powers.

By misapplying principles of § 301 pre-emption, the California court has implicated the related, but analytically distinct, area of "*Machinists*" pre-emption under the NLRA.[7] As explained in *Metropolitan Life v. Massachu-*

[7] *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

setts, 471 U.S. at 749, *Machinists* pre-emption "protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated." [8] Understanding that the NLRA's primary concern is not with the substantive terms of a privately-bargained agreement, but instead "with establishing an equitable process for determining" those substantive terms, *id.* at 753, this Court has held that "[m]inimum state labor standards [that] affect union and nonunion employees *equally* . . . neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Id.* at 755 (emphasis added).

Under these principles, this Court has found no inconsistency between the NLRA and state laws which specify minimum benefits that either are available to all employees, *id.*, or are available to all *unless* the parties to a collective bargaining agreement agree otherwise, *Fort Halifax Packing*, 482 U.S. at 22. *See also Barrentine v. Arkansas-Best Freight System*, 450 U.S. at 745 (no incompatibility between federal law establishing minimum employment standards and NLRA); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). This Court has, however, found a basic incompatibility between federal labor policy and a state's threat to withdraw state benefits from employees who utilize the instruments of that policy. *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967).[9]

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[8] While initially used "to determine whether certain weapons of bargaining neither protected by § 7 nor forbidden by § 8(b) could be subject to state regulation[,]" the doctrine has come to be used "to determine the validity of state rules of general application that affect the right to bargain or to self-organization." *Id.* at 750-51 n.27.

[9] *Nash* involved Florida's application of its unemployment compensation statute, which disqualified putative recipients for time when their unemployment was "due to a labor dispute in active progress." 389 U.S. at 441. The state unemployment commission considered an employee to be ineligible under that provision during

Three federal courts of appeals have recently considered whether states may validly withhold the benefits of generally-applicable laws in ways which impinge on federally-protected rights. Two of the three courts—the Fourth and Eighth Circuits—found these state actions to violate federal labor policy, while the Ninth Circuit held otherwise. The Fourth Circuit case, *Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148, involved West Virginia's application of its "Neutrality Statute," W. Va. Code § 15-2-13, which forbids state officers to "aid or assist either party . . . in any labor trouble or dispute between employer and employee . . . ." 971 F.2d at 1150-52. The state police officially understood the statute to require them to refrain from providing even their usual measure of protection during a labor dispute, and during a coal mine strike, the police accordingly refused to arrest picketers trespassing on mine property. While acknowledging that the Neutrality Statute was facially valid, the Fourth Circuit held that the police's inaction had hampered the mine owner's federal right to withstand a strike.

The Eighth Circuit reached a similar result in *Steelworkers v. Johnson*, 830 F.2d 924, 926-29, concerning South Dakota's application of its unemployment compensation laws. The state statute required that claimants be "involuntarily unemployed" to be eligible for benefits. In *Johnson*, a coal mine operator shut down the mine in response to the union's vote to strike. The South Dakota Department of Labor denied benefits to all union members who were locked out, but granted them to the *nonunion* members of the bargaining unit, on the theory

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the time when her unfair labor practice charge, alleging she had been laid off for her union activities, was pending before the NLRB since, in the state's view, there was a "labor dispute in active progress" during that time. This Court held that the state's threat to withhold its benefits from employees who "cooperat[e] with the Government's constitutional plan" violated the Supremacy Clause. *Id.* at 239.

that, because the latter were ineligible to participate in the strike vote, they were "involuntarily unemployed." The members, by contrast, were deemed to be "voluntarily unemployed." Holding that the state agency's "skewed application of its facially neutral test . . . significantly burdens the section 7 right to participate in organized labor," 830 F.2d at 928-29, the *en banc* court enjoined South Dakota from applying the statute to disqualify employees based on their union activity. *Id.*

Unlike the Eighth and Fourth Circuits, the Ninth Circuit has failed to comprehend the damage to federal labor policy wrought by a state's practice of withholding benefits based on the intended recipient's exercise of protected rights. In *Livadas v. Aubry*, 943 F.2d 1140, the Ninth Circuit was confronted with precisely the same California Labor Commissioner's policy that is at issue herein. Livadas claimed that by denying her the benefits of § 203, the Commissioner had violated her federal rights. According to the Ninth Circuit, the gravamen of Livadas' claim was that the Commissioner had misapplied facially valid eligibility criteria, and in its view, Livadas had no federal right to a correct interpretation of a valid state statute. *Id.* at 1146. The court therefore held that it was without jurisdiction to evaluate the Commissioner's decision to deny represented employees the benefits of the state statute.[10]

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[10] While finding it unnecessary to reach the question whether the Commissioner had incorrectly held Livadas' claim to be pre-empted, *id.* at 1145, the court nonetheless essentially applauded the Commissioner for erring—if at all—on the side of leaving the dispute to be resolved through arbitration, *id.* at 1147, ignoring, as did the state court in this case, the fact that the remedies available under state law were not available under the collective bargaining agreement, and therefore not attainable through arbitration.

Between *Livadas* and this case, employees working under collective bargaining agreements in California are trapped in a sort of "Catch-22." According to the Ninth Circuit, employees like Livadas and Hart have no recourse in federal law and should, instead, pursue a mandamus action in state court. *Id.* at 1146. But according to the

3. The reach of the Superior Court's decision goes well beyond the interests of the individual petitioner in this case. Even limited to its particular facts, the case poses serious questions whether the California Labor Commissioner may continue to decline to enforce protective provisions of the Labor Code on behalf of employees whose *other* terms and conditions of employment are governed by collective bargaining agreements, and whether the state courts may similarly refuse to entertain such claims when individual employees attempt to prosecute them on their own behalf.

The implications, however, are far broader than the reach of this particular California statutory provision, since the principles at issue apply with equal force to state enforcement of all generally-applicable labor standards. Minimum labor standards, like those in *Metropolitan Life*, *Fort Halifax Packing*, and the California Labor Code, are extremely commonplace.[11] Indeed, enacting legislation which provides basic protections, and forms the "backdrop" against which parties may negotiate, "is 'a valid and unexceptional exercise of the [State's] police power.' "

Superior Court's ruling in the instant case, such a state court action will not lie. These employees thus have no recourse at all, except in this Court.

[11] In providing but a "partial catalogue of [such] statutory employment standards in the [nine states in the] Ninth Circuit," the Service Employees International Union, AFL-CIO, CLC ("SEIU"), was able to identify *twenty* state statutes which create minimum employment conditions, including

> timely wage payment on discharge, employee access to personnel files, prohibitions against wage deductions for breakage or loss, prohibitions against blacklisting former employees, vesting rights in unused vacation pay on discharge, mandatory meal breaks and rest periods during the workday, and mandatory leave for jury and witness duty.

Brief of Amicus Curiae SEIU in Support of Petition for Certiorari, *Livadas v. Aubry*, No. 92-1920, at 4-5 (citations omitted). *See, id.* nn. 3-9 and Appendix.

Fort Halifax Packing, 482 U.S. at 21, 22 (*quoting Metropolitan Life*, 471 U.S. at 758). The California court has sanctioned the view that the mere presence of a collective bargaining agreement strips employees of the protections of state labor standards. Permitting this view to stand would essentially give the states carte blanche to penalize employees who choose to be represented by a collective bargaining agent, or indeed, who, though not *themselves* choosing union representation, are nonetheless represented by a collective bargaining agent by virtue of the choice of a majority of their co-workers.

Leaving the states with that power would serve seriously to undermine the collective bargaining scheme embodied in the NLRA and protected through *Machinists* pre-emption. As Judge Kozinski noted in his dissent in *Livadas v. Aubry*, California's approach to §§ 201 and 203 permits employers truthfully to warn their employees during labor organizing campaigns: "Look here, if you vote for the union, the first thing that happens is that the state Labor Commissioner abandons you." 943 F.2d at 1150 n. 2 (Kozinski, dissenting). In fact, accepting the Superior Court's approach as a reasonable means of state regulation would permit employers to warn employees generally that "if you vote for the union", *or if your colleagues vote for the union*, you may stand to lose the full panoply of minimum wage and employment protections otherwise available under state law. No greater deterrent to the exercise of § 7 rights is imaginable.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

SACRAMENTO MUNICIPAL COURT DISTRICT
COUNTY OF SACRAMENTO,
STATE OF CALIFORNIA

Case No. 89C18711

JOHN J. HART,

Plaintiff,

vs.

STOCKMAR ENERGIE, INC., dba L. F. C. POWER CORP.,

Defendant

DECISION ON SUBMITTED MATTER

The above entitled cause came before the Court for trial on May 13, 1991. Plaintiff appeared in propria persona; defendant appeared by attorney DOROTHY BACSKAI EGEL. Evidence and argument were received, and the matter was submitted.

No statement of decision was requested; none is required. The Court will, nevertheless, briefly explain its decision.

The following facts were established by stipulation:

Plaintiff was employed by Defendant as a construction electrician between May 16, 1988 and August 29, 1988. During the period of employment, Plaintiff was covered by the terms of a collective bargaining agreement (hereinafter referred to as "the CBA") between the National Industrial Union (hereinafter referred to as "NIU") and Defendant. The CBA governs the terms and conditions of employment of Plaintiff by Defendant, including the

payment of overtime pay; but per Plaintiff is not the sole determinant. Article I, subsections 1.4(a) through 1.6 of the CBA provides for the resolution of grievances arising out of the CBA by the parties.

On August 29, 1988, Plaintiff was terminated from employment with Defendant. During his last pay period, Plaintiff did not inform either Morrell or Butterfield that he had worked any overtime during that period. On or about September 10, 1988, two (2) weeks after his employment ended, Plaintiff presented a grievance to his union representative claiming, *inter alia,* that Defendant owed Plaintiff overtime wages for one (1) hour's overtime work, and also claiming all applicable penalties under state and federal law. On or about September 10, 1988, Plaintiff's union representative presented a written grievance on behalf of Plaintiff to Defendant's collective bargaining representative claiming, *inter alia,* overtime wages and all applicable penalties under state and federal law. On or about September 26, 1988, Plaintiff's union representative met to discuss, *inter alia,* Plaintiff's claim for overtime compensation and penalties. By check dated September 30, 1988, Defendant paid Plaintiff Twenty Seven Dollars Thirty-eight cents ($27.38). As of October 10, 1988, Plaintiff was paid all overtime wages which he claimed to be owed by Defendant.

On the evidence presented without contradiction or impeachment, the Court makes the following additional findings:

At the time of Plaintiff's termination, Plaintiff's hourly rate was Eighteen Dollars Twenty-five cents ($18.25); and Defendant furnished Plaintiff with a payroll check which included payment for the hours worked, exclusive of overtime hours, through the time of termination on August 29, 1988. Defendant has not cashed the Twenty Seven Dollars Thirty-eight cents ($27.38) check ultimately paid for overtime. During the union and management meetings regarding the grievance submitted on

Plaintiff's behalf, Defendant insisted that federal and state penalties were not a part of the CBA. They in fact are not included or excluded by the CBA. When contacted, the union President refused to pursue the matter of penalties through arbitration on that basis, informing Plaintiff that his remedy lay with the state authorities for such a claim. Shortly thereafter, the union "dissolved or disbanded" and per the evidence the union President "disappeared." Plaintiff sought intervention regarding the penalties with the California Labor Commissioner. Defendant's attorney at such proceedings asserted that the Commission had no jurisdiction in light of Labor Code § 229 and federal preemption; that Plaintiff's remedy lay with the NLRB. The Labor Commission declined jurisdiction in light of Labor Code § 229. Plaintiff sought a remedy with the NLRB, which declined to exercise jurisdiction to enforce the state penalties. Plaintiff then filed this civil action.

In its answer to the amended complaint, Defendant asserted certain affirmative defenses, to wit: (1) that Plaintiff's claim requires the interpretation or application of a collective bargaining agreement and is thereby preempted by Section 301 of the Labor Management Relation Act, 29 USC § 185; (2) that Plaintiff's claim is barred by Section 229 of the California Labor Code; (3) that Plaintiff's claim is barred by the doctrine of accord and satisfaction; (4) that Plaintiff's claim is barred by the doctrine(s) of res judicata and/or collateral estoppel; and (5) that any failure to pay wages due upon termination of Plaintiff's employment was not "willful" within the meaning of California Labor Code § 203.

In earlier proceedings before a different Judge of this Court, Plaintiff prevailed against Defendant's demurrer and motion for summary judgment.

The Court respecting the trial, has independently researched the legal principles relevant to defendant's affirmative defenses, and concludes that Plaintiff's claim

(1) is not preempted by Section 301 of the Labor Management Relations Act; (2) is not barred by Section 229 of the California Labor Code; (3) is not barred by the doctrine of accord and satisfaction; and (4) is not barred by the doctrine(s) of res judicata and/or collateral estoppel. These conclusions are legal in nature, based upon essentially undisputed facts.

The substantial issue litigated and argued by the parties at trial was that identified by the Court in its denial of Defendant's motion for summary judgment to wit: Whether Defendant willfully failed to pay any overtime wages due Plaintiff in accordance with Labor Code § 201 (*sic*).

Although the Court's prior order refers only to Labor Code § 201, the essential dispute between the parties involves Labor Code § 203, which provides for waiting time penalties for a willful failure to pay wages required to be paid under Labor Code § 201. By regulation effective August 8, 1988, the State Labor Commission interprets "willful" under the statute as follows:

> "A willful failure to pay wages within the meaning of Labor Code § 203 occurs when an employer intentionally fails to pay an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.
>
> A "good faith dispute" that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a "good faith dispute"."
>
> 8 Cal Code Reg 13520.

There was no dispute in the evidence that on the afternoon of Wednesday, August 24, 1988, Plaintiff, the field supervisor (Morrell) and the overall construction site supervisor (Butterfield) met to discuss construction progress and Plaintiff's performance on the site. There was no dispute that during the course of that meeting there were discussions regarding Plaintiff (as lead man) coming in one-half (½) hour early to review the plans in preparation for each day's activities. There was no dispute in the evidence that if Plaintiff was authorized to do so, and if Plaintiff did so prior to termination, Plaintiff was entitled at termination to overtime pay both under the CBA and under the company employee manual. There was no dispute as to what the rate of pay would be, nor as to the overtime Plaintiff claimed at termination.

There was no dispute in the evidence that Defendant made the determination to terminate Plaintiff on Friday, August 26, 1988; and effectuated the termination at midmorning on August 29, 1988. At that time, the check tendered and accepted did not include payment for overtime. There was no dispute in the evidence that when Plaintiff accepted the check he indicated that he was entitled to overtime pay.

Plaintiff was clear and adamant in his testimony that: at the August 24, 1988 meeting, Butterfield stated that he would authorize overtime for Plaintiff to come in early; that Plaintiff came in early on Thursday, Friday, and Monday; and that, when queried regarding the failure to include overtime in the termination check, Morrell indicated that he had just forgotten it, and would notify Portland to have an additional check forwarded. Butterfield did not testify at the trial.

Testimony established that shortly prior to the termination of Plaintiff, Plaintiff had been a part of a dispute with two or three other workers on the project, and that the dispute had been discussed between Holland (Plaintiff's

foreman), Morrell, and Butterfield. Holland testified that he was quite satisfied with Plaintiff's work; and that, contrary to his recommendation, Morrell and/or Butterfield made the determination to layoff Plaintiff. Morrell testified that he thought he recalled that others were laid off at about the same time as Plaintiff; all other evidence presented was to the contrary.

Morrell testified that he recalled a discussion with Holland regarding Plaintiff working overtime. His adamant recollection was that the discussion was part of a process of determining whether overtime would be authorized. Holland's recollection, though neither specific nor unequivocal, was that Morrell's statements were such that Morrell knew that overtime had been authorized, and was being worked.

On the issues of whether Plaintiff was authorized to work overtime and whether Morrell knew of the authorization, the Court finds in favor of Plaintiff and against Defendant. The clear preponderance of the evidence so indicated. As Plaintiff argued, the ultimate "smoking gun" on the point is the "6:30 a.m." entry by Morrell appearing on Defendant's Exhibit "E".

Did Plaintiff begin work early on Thursday, Friday, and Monday? His supporting witnesses (Norwood and Murray) were little helpful on the question of whether Plaintiff actually did work overtime as he testified. Norwood's testimony was internally inconsistent as he attempted to recall whether he was or was not still commuting with Plaintiff on the subject mornings; Murray recalled that Plaintiff worked early on Monday; but believed that Plaintiff started with the rest of the crew on Thursday and Friday.

The foreman's (Holland) Time Distribution Sheet did not indicate overtime work, but Holland testified that he did not come in early on Thursday, Friday, or Monday; so would not know whether Plaintiff was working early

or not. He was not informed on Friday of the Butterfield/ Morrell decision to terminate Plaintiff on Monday; so would have had no special reason to inquire of Plaintiff regarding the point. All witnesses agreed that it was standard practice regarding the preparation of payroll and termination checks to use both the Time Distribution Sheet and the time cards. Plaintiff testified that he did start work early, and that he did clock in. His time card, thus, would indicate whether he did or did not start work early on the days involved. Morrell testified that on Friday the 26th, to verify the Time Distribution Sheet information as to Plaintiff, he looked for and could not find Plaintiff's time card. Dorothy Beach Kofski testified regarding her inability to find Plaintiff's card at some point (she thought either Monday or Wednesday; conceded it could have been the preceding Friday). Norwood and Murray testified that Plaintiff's card was in the card locker after Plaintiff left the project. When pressed by the Court, Ms. Beach Kofski conceded that in the normal practice of Defendant and in light of Defendant's Exhibit "D", one might reasonably infer that Morrell had Plaintiff's time card when Defendant's Exhibit "D" was prepared. More importantly to the decision on this issue, when confronted by Plaintiff at the time of termination with the overtime issue, Morrell said nothing about a lost time card; specifically it "never occurred to him" to say anything about it. He testified that he later looked "again" for the time card and thinks he discussed it with Butterfield, but did not remember whether he had inquired of Holland. Finally, per his testimony, without Plaintiff's time card "there was no way to double check" Plaintiff's contentions that he was owed wages for overtime work.

Plaintiff has suggested that Morrell did not check the time card in connection with the preparation of the termination check, and that its absence was not discovered until Wednesday when Ms. Beach Kofski looked for it in connection with her end of the month practice. This

would be consistent with the testimony of Norwood and Murray that Plaintiff's time card had remained at the card locker after Plaintiff was terminated; but inconsistent with Morrell's testimony that immediately after Plaintiff complained regarding the overtime pay he searched for the card and it was missing. Moreover, it is inconsistent with Morrell's testimony that, when he accumulated the information for the termination check, (on Friday) he looked for and could not find Plaintiff's card.

On the evidence presented, the Court finds that Defendant was authorized to work the overtime hours, that he did work the overtime hours, and that he was not paid for the overtime hours until more than thirty (30) days after they were due.

Undoubtedly, there will be cases where an employer, upon good faith efforts to verify a terminating employee's claims, will properly delay payment and submit to grievance procedures related claims without incurring Labor Code Section 203 penalties. But in this case, the Court finds that Morrell (either in conjunction with Butterfield or not) either participated in circumstances giving rise to the loss of Plaintiff's card (after reviewing same and determining that overtime was claimed); or, prepared and delivered to Plaintiff a termination check without verifying by the time card whether overtime was claimed; then, when reminded of an overtime claim, proceeded with a reckless disregard for or indifference to Plaintiff's claim until the time card was lost—thereby leaving the employee in a situation where his claim would be fraught with the difficulties of litigation, and failing memories. The circumstances of this case, on the evidence presented, preclude a finding of a "good faith dispute"; Defendant's failure to pay the overtime was "willful" within the meaning of Labor Code § 203.

Plaintiff shall recover from defendant as a penalty under Labor Code § 203 One Hundred Forty Six Dol-

lars ($146.00) per day times thirty (30) days, for a total of Four Thousand Three Hundred Eighty Dollars ($4,380.00), plus costs. Plaintiff to prepare and submit an appropriate judgment for signature by the Court, submitting first to counsel for Defendant for approval as to form.

Dated: May 22, 1991

/s/ John R. Lewis
JOHN R. LEWIS
Judge of the Municipal Court

[SEAL]

APPENDIX B

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO
APPELLATE DEPARTMENT

Dept. No.: 21

August 21, 1992

JUDGE ANTHONY DECRISTOFORO, JR., Presiding

CV368127

JOHN J. HART,
plaintiff/respondent

vs.

STOCKMAR ENERGY, INC., *et al.*,
defendant/appellant

APPEAL FROM MUNICIPAL COURT
RULING ON SUBMITTED MATTER

The above entitled matter came on for oral argument on August 21, 1992. The matter was argued and the Court took the matter under submission. The Court now makes the following ruling:

The judgment is reversed.

APPENDIX C

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

Dept. No.: 21

October 13, 1992

JUDGE ANTHONY DECRISTOFORO, JR., Presiding

CV 368127

JOHN J. HART,
plaintiff/respondent
vs.

STOCKMAR ENERGY, INC., *et al.*,
defendant/appellant

APPEAL FROM MUNICIPAL COURT
RULING ON PETITION FOR REHEARING

The petition for rehearing is granted. The new decision is the following:

Plaintiff's claim for penalties under Labor Code sections 201 and 203 is barred by Labor Code section 229 and preempted by section 301 of the Labor Management Relations Act (29 U.S.C., § 185.)

The judgment is reversed and the trial court is directed to enter judgment for defendant.

APPENDIX D

No. S030678

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

JOHN J. HART,
Petitioner

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO
APPELLATE DEPARTMENT,
Respondent

STOCKMAR ENERGIE, INCORPORATED, *et al.*,
Real Party in Interest

[Filed Jan. 15, 1993]

The above entitled matter is transferred to the Court of Appeal, Third Appellate District.

/s/ Mosk,
Acting Chief Justice

APPENDIX E

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

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3 Civil C015086
Sacramento CV368127

JOHN J. HART,
Petitioner

vs.

SUPERIOR COURT, SACRAMENTO COUNTY,
Respondent

STOCKMAR ENERGIE, INC.,
Real Party In Interest

[Filed Jan. 28, 1993]

By the Court:

The petition for writ of mandate is denied.
Dated: January 28, 1993

BLEASE,
Acting P.J.

APPENDIX F

Third Appellate District No. C015086
S031138

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

JOHN J. HART,
Petitioner

v.

SACRAMENTO COUNTY SUPERIOR COURT,
Respondent

STOCKMAR ENERGIE INCORPORATED,
Real Party In Interest

[Filed Mar. 17, 1993]

Petition for review DENIED.

/s/ Mosk
Acting Chief Justice